Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

CECILIA GONZALEZ,

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v.

BMG MUSIC, SONY ENTERTAINMENT INC., UMG RECORDINGS, INC., FONOVISA, INC. AND ATLANTIC RECORDING CORP.

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 17 U.S.C. § 504(c) and 17 U.S.C. § 402(d) unconstitutionally proscribe the Seventh Amendment to the United States Constitution and its guarantee of a right to a jury trial when a plaintiff in a copyright infringement action seeks damages.

PARTIES TO THE PROCEEDINGS

Cecilia Gonzalez was Defendant-Appellant below and is the petitioner in this Court.

BMG MUSIC, a New York general partnership; SONY MUSIC ENTERTAINMENT, INC., a Delaware corporation; UMG RECORDINGS, INC., a Delaware corporation; FONOVISA, INC., a California corporation; and ATLANTIC RECORDING CORPORATION, a Delaware corporation were Plaintiffs-Appellees below and are the respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Cecilia Gonzalez petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 430 F.3d 888 and is reprinted in the appendix hereto ("App.") at 1a. The order of the District Court awarding judgment to the respondent is unreported and is reprinted at App. 10a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 2005. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Pursuant to Rule 14.1(e)(v), the Solicitor General of the United States has been served with this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

17 U.S.C. § 504(c) provides, in pertinent part:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the

> ...oses of this subsection, all the parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.

17 U.S.C. § 402(d) provides:

> If a notice of copyright in the form and position specified by this subsection appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.

INTRODUCTION

This petition asks the Court to resolve the issue of whether the guaranteed right to a trial by jury, embodied in the Seventh Amendment to the Constitution, can be taken away by Congress' enactment of statutes prescribing damages in a copyright infringement case. According to this Court's decision in *Feltner v. Columbia Pictures*, "the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under §504(c) of the Copyright Act, including the amount itself." *Feltner*, 523 U.S. 340, 355 (1998). "The right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner." *Id.* at 353.

STATEMENT OF THE CASE

Petitioner Cecilia Gonzalez is a twenty-eight year old mother of five children, ranging in age from two to eleven years. She is an immigrant, with a ninth grade education who learned English only as a second language. In March 2003, Ms. Gonzalez invested in a computer for her family. For several weeks in 2003, the family maintained in home high-speed internet access. At first, the access was not cost prohibitive, but within three months, the cost of the high-speed internet access doubled. Ms. Gonzalez decided to turn it off.

During the brief time that Ms. Gonzalez had high-speed internet access, she downloaded music using a program called KaZaA. Ms. Gonzalez downloaded music from the internet to research music that she wanted to purchase or to put music that she already owned on her computer. KaZaA did not provide Ms. Gonzalez the option of previewing a song before downloading it. Thus, when downloading

music for her pre-purchasing research, Ms. Gonzalez was unable to download less than the complete song. Ms. Gonzalez had, and has, minimal knowledge of computers. She speaks English as a second language. She believed that KaZaA was providing the music to her legally. It is undisputed that Ms. Gonzalez was not sharing the songs that she downloaded and she did not even know that the music came from other KaZaA users' computers. She did not browse others' files. Nor did she create a library of songs on CD. Primarily, Ms. Gonzalez was merely replicating songs, the vast majority of which she already owned, for personal enjoyment. Additionally, she researched songs for additional purchases of compact disks. Ms. Gonzalez no longer downloads music (or anything else) from the internet because she does not have internet access.

Respondent BMG Music, et al ("BMG") brought a copyright infringement action against petitioner, Cecilia Gonzalez. After limited discovery, the district court granted summary judgment on liability and damages in favor of BMG. App. 9a. Gonzalez opposed the motion for summary judgment, noting that under *Feltner v. Columbia Pictures*, the Seventh Amendment of the United States Constitution guarantees a right to a jury trial on all issues pertinent to damages. 523 U.S. 340 (1998). Gonzalez also noted that genuine issues of material fact remained on her fair use defense. The district court, relying on *dicta* from decisions in secondary liability cases, instead of evidence in the record, granted BMG's motion for summary judgment, awarding $22,500 in damages under 17 U.S.C. §504(c) and entering a permanent injunction.

On appeal, Ms. Gonzalez renewed her argument that she was entitled to trial by jury on all issues pertinent to damages under the Seventh Amendment. Gonzalez specifically argued that 17 U.S.C. §402(d)

unconstitutionally proscribes a jury trial on issues pertinent to damages in a copyright infringement action and that the District Court erred as a matter of law by denying Gonzalez the opportunity to present her fair use defense to a jury where material issues of fact remained. The Court of Appeals rejected both arguments. The court read "*Feltner* as establishing no more (and no less) than that cases under §504(c) are normal civil actions subject to the normal allocation of functions between judge and jury... if there is no material dispute and a rule of law eliminates discretion in selecting the remedy, then summary judgment is permissible." App. 7a. The court concluded that a jury is not required to determine the amount of damages because BMG requested the minimum statutory damages under §504(c), in light of §402(d). *Id.*

REASON FOR GRANTING THE WRIT

THE COURT SHOULD CORRECT THE ERROR IN THE SEVENTH CIRCUIT IN FAILING TO FOLLOW THE RULING OF THIS COURT AND THE SEVENTH AMENDMENT TO THE CONSTITUTION

The question presented by this case is related to the issue resolved by *Feltner v. Columbia Pictures*, 523 U.S. 340 (1998). In an attempt to limit this Court's holding, the Seventh Circuit concluded that *Feltner* does not require a jury trial when 17 U.S.C. §402(d) applies and the minimum statutory damages are sought. App. 7a. Allowing the Seventh Circuit's decision to stand will encourage additional erroneous decisions at both the district and circuit court levels and will undermine the Seventh Amendment right to a jury trial in all copyright infringement cases.

This Court should grant this petition because the decision of the Seventh Circuit conflicts with this Court's holding in *Feltner* and contravenes an important Constitutional right, the right to jury trial. From the inception of this country, Americans have recognized that the right to trial by jury protects citizens from the tyranny of the powerful. The abrogation of the right to trial by jury was one of the American colonists' principal complaints against King George III. The right to a jury trial was specifically referenced in the Declaration of Independence (Declaration of Independence ¶ 20 (1776)) and was one of the few rights on which there was universal agreement by the Framers of the Constitution: "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it is the very palladium of free government. *The Federalist No. 83*, at 499 (Clinton Rossiter ed. 1961). As Thomas Jefferson wrote, the right to a jury is "the only anchor yet imagined by man, by which a gc ernment can be held to the principles of its constitution." 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861).

In *Feltner*, this Court examined the long history of the right to a jury trial, concluding that "there is overwhelming evidence that the consistent practice at common law was for juries to award damages." *Feltner* at 353. This was the consistent practice in copyright cases, "juries assessed the amount of damages under the Copyright Act of 1831, even though that statute, like the Copyright Act of 1790, fixed damages at a set amount per infringing sheet." *Id.* at 354 (emphasis added).

Feltner held that "the Seventh Amendment to the United States Constitution guarantees the right to a jury trial on all issues pertinent to an award of statutory